TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 192

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ALUMINUM GOODS MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1932
CERTIORARI GRANTED OCTOBER 10, 1932

SUPREME COURT OF THE UNITED STATES

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1 Before U. S. Board of Tax Appeals

Docket No. 15814

ALUMINUM GOODS MANUFACTURING COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Appearances:

For Taxpayer: Paul Myers, Esq., Edwin S. Mack, Esq.

For Comm'r.: W. F. Gibbs, Esq., A. Lisenby, Esq., G. S. Herr, Esq., F. R. Shearer, Esq.

Docket Entries

1926

May 10—Petition received and filed.

" 14—Copy of petition served on solicitor.

" 14—Notification of receipt mailed taxpayer.

Jul. 13—Motion for 60 days extension to answer filed by solicitor.

" 19—Answer filed by solicitor.

" 19—Granted. Both sides notified.

Aug. 27—Copy of answer served on taxpayer. General Calendar.

1927

Apr. 22—Motion to withdraw answer and file amended answer filed by general counsel.

" 25—Copy of motion served on taxpayer. Assigned to June 7, 1927.

Jun. 7—Hearings had before Mr. Arundell on motion of April 22, 1927.

" 8—Ordered proceedings to be continued to Day Calendar of August 29, 1927 for hearing on motion.

Aug. 30—Hearing had before Mr. Green by agreement, continued three weeks, and answer to be amended.

Sep. 1—Ordered proceeding be continued to September 20, 1927, on respondent's motion April 22, 1927. Signed and filed. Both sides notified.

2 " 20—Hearing had before Mr. Littleton on respondent's motion April 4, 1927. Granted.

" 20—Ordered motion granted and respondent given 30 days to file amended answer. Signed and filed. Both sides notified.

1928

Dec. 3—Motion for transfer to Circuit Calendar, filed by taxpayer. Granted December 4, 1928.

1929

Apr. 17—Hearing set May 21, 1929 at Milwaukee, Wisconisn.

May 10—Motion for continuance subsequent to June 15, 1929, filed by taxpayer.
" 11—Order placing on Day Calendar of June 20, 1929, entered.
" 14—Motion for leave to amend answer, amendment tendered, filed by general counsel. May 16, 1929 granted.
Jun. 18—Motion to continue to some date subsequent to June 25, 1929, filed by taxpayer.
" 19—Motion granted and set for hearing June 27, 1929.
" 27—Hearing had before Mr. Arundell on respondent's motion to continue. Ordered to Reserve B.
" 27—Order proceeding be placed on Reserve Calendar for call on 20 days notice, entered.

1929

Nov. 14—Order placing on Circuit Calendar for Milwaukee, Wisconsin, entered.
" 19—Motion to place on Reserve Calendar filed by general counsel. No action necessary.

1930

May 21—Hearing set July 11, 1930 at Milwaukee, Wisconsin.
" 28—Order continuing to fall term 1930 on General Calendar.
Aug. 15—Hearing set October 6, 1930.
Oct. 6—Hearing had before Mr. Sternhagen on merits. Stipulation of facts filed. Petitioner's brief due in 30 days.
" 25—Transcript of hearing of October 6, 1930, filed.
3 Nov. 3—Motion for extension of 30 days from November 5, 1930 to file brief, filed by taxpayer.
" 4—Granted for both sides to December 5.
Dec. 17—Motion for extension to December 15, 1930 to file brief, filed by taxpayer. Granted to December 17, 1930.
" 17—Brief filed by taxpayer.

1931

Feb. 2—Opinion rendered, J. M. Sternhagen, Div. 10, for 1917–1919 & 1921. Judgment will be entered for respondent.
" 3—Motion for supplemental report, filed by general counsel.
" 4—Supplemental memorandum opinion rendered, J. M. Sternhagen, Div. 10.
" 6—Order of dismissal and judgment entered, Div. 10.
Jul. 31—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.
" 31—Proof of service filed.
Sep. 1—Agreed statement of evidence lodged.
" 1—Præcipe filed.
" 1—Proof of service of præcipe filed.
" 3—Agreed statement of evidence approved and ordered filed.

Before U. S. Board of Tax Appeals

Petition

Filed May 10, 1926

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:E:SM:60D CH, dated March 27, 1926, and as a basis of its proceeding alleges as follows:

1. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office at 15th and Franklin Streets, Manitowoc, Wisconsin.

4 2. Notice of deficiency, a copy of which is attached hereto and marked "Exhibit A," was mailed to the petitioner on March 27, 1926.

3. The tax in controversy is income and excess profits tax for the year ending December 31, 1917, and the amount thereof, as nearly as may be determined, is $29,250.11. The statement accompanying the notice of deficiency states a deficiency of $5,438.57. Waiver of the right to have taxes due for 1917 determined and assessed within five years after the return was filed, was filed on or about the 27th day of February, 1921, and claims for refund of income and excess profits tax paid for the year 1917 have been duly filed on the 5th day of February, 1923, and the 24th day of February, 1923, and an additional claim for refund was duly filed with the Commissioner of Internal Revenue in the month of March, 1923, and the amount for which claims for refund have been made includes the difference between $29,250.11 and the sum of $5,438.57 set forth in the statement accompanying the notice of deficiency.

The correction of this error in the taxes for 1917 amounting to $29,250.11 results in an increase based thereon of the invested capital of the petitioner for the years 1918, 1919, 1920 and 1921; and such change in invested capital reduces the deficiency in tax for the years 1919 and 1921 and increases the overassessment for the years 1918 and 1920 set forth in said Exhibit A as follows, to wit:

1918	$1,124.09
1919	1,484.91
1920	1,547.55
1921	464.39

The waiver of the right to have the taxes due for 1918 determined and assessed within five years after the return for such year was filed, was filed before June 15, 1924, and claim for refund relating to the taxes for the year 1918 was filed March 13, 1924.

Such a waiver in respect of taxes due for the taxable year 1919 was filed before June 15, 1925, and a claim for refund relating to taxes for said year 1919 was filed January 20, 1925.

Such waivers in respect of the taxes due for the taxable years 1920 and 1921 have been filed, and claims for refund relating to the taxes due for the years 1920 and 1921 were filed January 20, 1925.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

The Commissioner of Internal Revenue erred (a) in disallowing deduction for a loss sustained in 1917 on the dissolution and liquidation of Aluminum Sales & Manufacturing Company, the stock of which was held by petitioner and to which petitioner had prior to the dissolution advanced money and extended credit; and (b) in failing to give effect in subsequent years to the increases in invested capital resulting from the consequent reduction of taxes in 1917.

5. The facts upon which petitioner relies as a basis for the proceeding are as follows:

(a) In the year 1914 petitioner acquired all of the stock of Aluminum Sales & Manufacturing Company, paying therefor in cash $29,749.80. After acquiring said stock petitioner advanced moneys and extended credit to said Aluminum Sales & Manufacturing Company. Aluminum Sales & Manufacturing Company was dissolved in the year 1917, and petitioner continued to hold all of its stock until said dissolution and at the time of said dissolution was a creditor of said Aluminum Sales & Manufacturing Company in the sum of $47,486.31.

(b) Petitioner, being at the time of dissolution the sole owner of all the stock of Aluminum Sales & Manufacturing Company, acquired all the assets of said company, including good will and equipment. The good will of said company acquired by petitioner was of a value not in excess of $6,490.27, which was the basis at which said good will was computed in fixing the price of the stock of said Aluminum Sales & Manufacturing Company when the same was acquired by petitioner; and the equipment thus acquired by petitioner was of a value not in excess of $4,194.29, which was in excess of the value at which the same was computed in fixing the purchase price of the stock of Aluminum Sales & Manufacturing Company when acquired by petitioner.

(c) After applying the aggregate value of the good will and the equipment taken over as aforesaid, to wit: $10,684.56, against the indebtedness of Aluminum Sales & Manufacturing Company to the petitioner, a loss resulted to petitioner of $36,701.75, which, together with the loss of $29,749.80 paid in 1914 for the capital stock of said Aluminum Sales & Manufacturing Company, makes an aggregate loss of $66,551.55. Of this sum, $14,689.65 was returned and
6 allowed as an operating loss of Aluminum Sales & Manufacturing Company in 1917, and was reflected in the consolidated tax return of petitioner.

(d) To and including the year 1916 petitioner and the Aluminum Sales & Manufacturing Company made separate tax returns. During the years 1914, 1915, 1916, and 1917 the Aluminum Sales & Manufacturing Company sustained an operating loss each year, which

operating losses, with the exception of the operating loss in 1917, were not reflected in any return of the Aluminum Goods Manufacturing Company. The operating loss in the year 1917 was reflected in the consolidated tax return of the petitioner and Aluminum Sales & Manufacturing Company.

6. The claim of petitioner that it be allowed to deduct from its income the amounts above stated in subdivision (c) of paragraph 5 hereof, to-wit: $51,861.90 (being $66,551.$$, loss on liquidation, minus $14,689.65, operating loss of Aluminum Sales & Manufacturing Company in 1917, reflected in the consolidated return for that year) was duly presented to the Income Tax Unit of the Treasury Department and said unit decided against the claim of the petitioner. Thereupon, the petitioner, on or about the 9th day of December, 1922, appealed to the committee on appeals and review and said matter was duly presented to the committee on appeals and review on or about the 10th day of October, 1923, and the committee on appeals and review thereupon decided in favor of the claim of the petitioner, but said Income Tax Unit has failed and refused, in its computation of petitioner's income and excess profits tax for the year 1917, to give effect to the decision of the said committee on appeals and review and has refused to allow said losses for the year 1917 as aforesaid, and has computed the tax in disregard of said decision and has so notified petitioner.

Wherefore petitioner prays (a) that the United States Board of Tax Appeals may hear and redetermine the deficiency above referred to; (b) that the said deficiency in taxes for 1917 determined by the Commissioner of Internal Revenue be set aside; (c) that the sum of $24.811.54 included in claims for refund which were filed on the 5th day of February, 1923, and the 24th day of February, 1923, and the additional claim for refund presented to the Commissioner of Internal Revenue in March, 1923, be directed to be refunded to
7 petitioner; (d) that the United States Board of Tax Appeals determine that the income and excess profits tax of the petitioner for the year 1917 be computed after allowing as a deduction against the consolidated net income of the petitioner and Aluminum Sales & Manufacturing Company the sum of $51,861.90 on account of loss in connection with the stock of Aluminum Sales & Manufacturing Company, and on account of loss of the indebtedness of Aluminum Sales & Manufacturing Company to petitioner; (e) that the taxes for the years 1918 to 1921, both inclusive, be recomputed on the basis of increases in those years of the invested capital, made effective by the determination of the United States Board of Tax Appeals; that petitioner is entitled to the relief set forth under (a), (b), and (c) of this prayer for relief, and that the deficiency for 1919 and 1921 be decreased by the amounts of $1,484.91 and $464.39, respectively, and that the overassessment for the years 1918 and 1920 be

increased by the amounts of $1,1[illegible]4.09 and $1,547.55, respectively, as set forth in paragraph 3 of this petition; and (f) that your petitioner may have such other and further relief as may be just.

EDWIN S. MACK,
Council for Petitioner,
1504 First Wisconsin National Bank Building, Milwaukee, Wis.
WM. M. WILLIAMS,
PAUL F. MYERS,
E. B. QUIGGLE,
Attorneys for Petitioner,
Munsey Bldg., Washington, D. C.

[*Duly sworn to by R. J. Findlan; jurat omitted in printing.*]

8 *Exhibit A to petition*

MAR. 27, 1926.

IT:E:SM:60D
CH

ALUMINUM GOODS MANUFACTURING COMPANY,
15th and Franklin Streets, Manitowoc, Wisconsin.

SIRS: An audit of your income and profits tax returns for the years 1917 to 1921, inclusive, has resulted in the determination of a deficiency in tax of $86,436.18 for 1917, 1919, and 1921, and overassessments for 1918 and 1920 of $76,190.52, as shown in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A,

9 and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of

IT:E:SM:60D
CH } In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR, *Commissioner.*

By ----------
Assistant to the Commissioner.

Enclosures:
Statement—Form 882
Waiver—Form A.
BS—1

MAR. 27, 1926.

Statement

IT:E:SM:60D
CH

In re: Aluminum Goods Manufacturing Company, Fifteenth and Franklin Streets, Manitowoc, Wisconsin.

Years examined	Deficiency in tax	Overassessment
1917	$5,438.57	
1918		$63,525.60
1919	66,119.06	
1920		12,604.84
1921	14,878.55	
Totals	86,436.18	76,190.52

Net deficiency in tax, $10,245.65.

After a careful review of your protests dated December 23, 1925, and January 18, 1926, against the denial of your application for assessment of your 1917 to 1921 profits tax under the provisions of Sections 210 and 327 and 328 of the Revenue Acts of 1917, 1918, and 1921, as set forth in Bureau letter dated November 27, 1925, and of all the evidence submitted in support of your contentions, the conclusion has been reached by the Bureau that no abnormality in either capital or income has been established as a fact.

10 In accordance with the above, the conclusions set forth in Bureau letter dated November 27, 1925, are sustained. Furthermore, the Bureau holds that the prior disallowance as a deduction from 1917 income of the loss sustained by the Sales Company is correct.

A copy of this communication has been forwarded to your authorized representative, Mr. Bert Vandervelde, Milwaukee, Wisconsin.
BS—1

Before U. S. Board of Tax Appeals

Amended Answer

Tendered May 14, 1929

Filed May 16, 1929

Comes now the Commissioner of Internal Revenue by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and for an amended answer to the petition on appeal in the above-entitled proceeding admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income and excess profits taxes for the calendar years 1917, 1919, and 1921.

Denies that the respondent determined any deficiencies for the calendar years 1918 and 1920, and avers that the board is without jurisdiction to hear and determine an appeal for these years, and moves, therefore, that the petition in so far is it relates to the years 1918 and 1920 be dismissed for lack of jurisdiction.

Admits that the statement accompanying the notice of deficiency states a deficiency of $5,438.57 for the year 1917.

Admits that a waiver covering the tax for 1917 was filed as alleged, but denies the materiality of said allegation.

Admits that claims for refund were filed for 1917, but denies the materiality of the allegation.

Admits that if error was made as alleged in paragraph 4
11 its correction would affect the tax liability for 1919 and 1921.

Avers that respondent not having determined a deficiency for 1918 or 1920 is required neither to admit nor deny the allegations relating to these years.

Admits that waivers and claims relating to the tax for 1919 and 1921 were filed as alleged, but denies the materiality of said allegations.

4. Denies that the respondent erred in determining the tax liability of petitioner for the years 1917, 1919, and 1921, as alleged in subparagraphs (a) and (b) of corresponding paragraph of the petition.

5. Admits and denies the allegations contained in corresponding paragraph of the petition, as follows:

(a) Admits that in the year 1914 petitioner acquired all of the stock of Aluminum Sales and Manufacturing Company, and admits that petitioner continued to hold said stock until the dissolution of the said Aluminum Sales and Manufacturing Company.

(b) Admits that petitioner being at the time of dissolution the sole owner of all the stock of Aluminum Sales and Manufacturing Company acquired all the assets of said company including goodwill and equipment.

(c) Admits that the sum of $14,689.65 was returned and allowed as an operating loss of Aluminum Sales and Manufacturing Company in 1917, and was reflected in the consolidated tax return of petitioner.

(d) Admits that the operating loss of the Aluminum Sales and Manufacturing Company in the year 1917 was reflected in the consolidated tax return of the petitioner and Aluminum Sales and Manufacturing Company.

6. Denies the materiality, relevancy, or competency of the allegations contained in corresponding paragraph of the petition, and avers that respondent is required neither to admit nor deny said allegations.

7. Avers that respondent erred in allowing as a deduction from the income of petitioner subject to normal tax for the year 1917 an alleged loss of $66,551.55 arising from the dissolution of the Aluminum Sales and Manufacturing Company. On information and belief respondent alleges that petitioner did not sustain any deductible loss during the year 1917 as the result of any dissolution of the Aluminum Sales and Manufacturing Company.

Denies generally and specifically each and every allegation in the petition contained not hereinbefore admitted, qualified, or denied.

12 Wherefore it is prayed that the appeal be denied and that the board determine that the income of petitioner for 1917 subject to normal tax should be increased by the sum of $66,551.55, and redetermine the tax accordingly.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
G. S. HERR,
Special Attorney,
Bureau of Internal Revenue.

Before U. S. Board of Tax Appeals

Statement of evidence

Lodged Sept. 1, 1931

Filed Sept. 3, 1931

The above cause came on for hearing before the Honorable John M. Sternhagen, member of the United States Board of Tax Appeals, on the sixth day of October, 1930, there being present the petitioner and respondent by their respective counsel.

Thereupon the following proceedings were had. After opening statements by counsel for petitioner and counsel for respondent there was introduced and filed as evidence in the case an agreed statement of facts, including Exhibit 1 attached thereto, which agreed statement of facts is as follows:

AGREED STATEMENT OF FACTS

1. Aluminum Goods Manufacturing Company, the petitioner, is a corporation organized in the year 1909 and existing under and by virtue of the laws of the State of New Jersey, with its principal office at Fifteenth & Franklin Streets, Manitowoc, Wisconsin. On March 27, 1926, the Commissioner of Internal Revenue mailed to the petitioner a notice of deficiency of income and excess profits taxes for the year ending December 31, 1917, a correct copy of which notice of deficiency is attached to the petition filed herein. The correct income and excess profits taxes of the petitioner for the years 1918, 1919, 1920, and 1921 are involved only in so far as such taxes are affected by a change in invested capital that may be
13 necessary on account of any change in the income and excess profits taxes of the petitioner for the year ending December 31, 1917, as may be found in this proceeding, the respondent by this stipulation, however, not admitting that the board has juridiction for the years 1918 and 1920.

2. The petitioner was a manufacturer and in the year 1914 it was selling its goods principally to jobbers. At that time the Aluminum Sales & Manufacturing Company (a New York Corporation), hereinafter called the Sales Company, was engaged in selling similar goods, principally to the retail trade, and during the year 1914 the petitioner purchased all the capital stock of the Sales Company, paying therefor in cash $29,749.80, as a business venture and for purposes of experimentation with the view of thereby acquiring a market to retailers. After the acquisition of its capital stock by petitioner, the Sales Company was operated as a jobbing house under the control of the petitioner, and the Sales Company sold, principally, goods manufactured by petitioner and sold by petitioner to the Sales Company, and the business of the Sales Company was almost exclusively that of furnishing an outlet for goods manufactured by petitioner.

3. The petitioner billed and delivered the goods to the Sales Company at its prevailing list price for that class of business. The goods were sold to retailers by the Sales Company and from the collections and its capital the Sales Company made remittances to petitioner for the goods purchased from the petitioner. The Sales Company conducted two places of business, one in Indianapolis, Indiana, and one in New York, New York. The Sales Company maintained a cash revolving fund of a fixed amount. When the Sales Company disbursed cash from time to time for the payment of operating expenses, such as rent, salaries, insurance, taxes, etc., the revolving fund was restored by advances from the petitioner.

4. The Indianapolis place of business of the Sales Company was discontinued during the year 1916 and at the end of that year the net unpaid cash advances to the Sales Company by petitioner for the use of that place of business amounted to $33,491.01.

5. During the year 1917 the New York place of business of the Sales Company was discontinued. Certain of the current assets of the Sales Company were thereupon taken over by the petitioner, the Sales Company receiving credit therefor on its open account with the petitioner. At the end of the year the net amount unre-
14 mitted to the petitioner for merchandise and cash furnished by the petitioner to the Sales Company for the use of that place of business was $13,995.30.

6. The net indebtedness of the Sales Company to petitioner as of the end of the year 1916 was $130,998.71, and at the end of the year 1917 said indebtedness had become reduced to $47,486.31, being the sum of the aforesaid amounts of $33,491.01 and $13,995.30, and the aforesaid sums of $33,491.01, and $13,995.30 never were repaid to the petitioner; and on its liquidation in 1917 Sales Company had no means with which to pay them, excepting the items of good will and equipment mentioned in paragraphs seven and twelve. Said sums were charged off by petitioner as follows: Said $33,491.01 December 30, 1916, and said $13,995.30 December 31, 1917.

7. The business of the Sales Company during the year 1917 consisted chiefly in finally closing up its affairs preparatory to formal dissolution. The Sales Company did not transact any business after the close of the year 1917, and all of its assets and liabilities were disposed of by the end of that year. In February, 1918, formal dissolution of the Sales Company was effected by the surrender of its charter. (See Exhibit 1, attached hereto and make a part hereof, being true copies of papers evidencing formal dissolution.) The petitioner being the sole owner of all of the capital stock of the Sales Company (the three individuals shown in Exhibit 1 being merely record owners) at the time of its liquidation in 1917, acquired all the assets of said company, including good will and equipment. The good will of said company acquired by petitioner was of a value of $6,490.27 which was the value placed upon the good will when petitioner purchased all the capital stock of the Sales Company in 1914, and the equipment thus acquired by petitioner was of a value of $4,194.29, exclusive of the items referred to in paragraph five. The good will and equipment were the only assets of any value acquired by the petitioner upon final liquidation of the Sales Company in 1917, and were the last remaining assets of the Sales Company. The Sales Company did not transact any business after the close of the year 1917, and all of its assets were completely disposed of during the year 1917, so that it had no assets whatsoever at the close of the year 1917. The petitioner charged off on its books all its investment in the capital stock of the Sales Company in the years 1916 and 1917, to wit: $11,025.47 December 31, 1916, and $18,724.33 December 31, 1917, making an aggregate of $29,749.80.

15 8. The operation of the Sales Company reflected losses during the years 1914, 1915, and 1916, which were not deducted in the determination of petitioner's net income for these

years, and the tax returns of the petitioner for said years included in its income a normal profit on the goods furnished by it to the Sales Company.

9. The operations of the Sales Company reflected a loss of $14,689.65 for the year 1917.

10. Up to and including the year 1916, the petitioner and the Sales Company made separate tax returns.

11. During the years 1914 to 1917, inclusive, the petitioner was the sole owner of all the capital stock of the Sales Company.

12. The petitioner filed a separate return for normal tax purposes, and a consolidated return with the Sales Company for excess profits tax purposes for the year 1917. On a separate amended return for 1917, petitioner claimed as a deduction a loss arising out of the liquidation of the Sales Company as follows:

Advances to Indianapolis office of Sales Co.	$33,491.01	
Advances to New York office of Sales Co.	13,995.30	$47,486.31
Investment in capital stock of Sales Co.		29,749.80
Total		77,236.11
Less: Value of good will and equipment received on liquidation of Sales Co.:		
Good will	6,490.27	
Equipment	4,194.29	10,684.56
Loss claimed and deducted		66,551.55

The respondent allowed this alleged loss in determining the net income subject to normal tax, as reflected in the deficiency notice.

13. In connection with the audit of its consolidated return for 1917, before the Bureau of Internal Revenue, the petitioner claimed a deductible loss of $51,861.90, being the difference between the alleged loss of $66,551.55 on liquidation of the Sales Company, less $14,689.65 operating loss of the Sales Company in 1917. The respondent in determining the net income subject to excess profits tax allowed the operating loss of $14,689.65 as such, as a deduction and disallowed the amount of $51,861.90. The deficiency de-

16 termined by the commissioner for the year 1917 is based upon a total tax liability as determined by the commissioner in the amount of $648,007.42, including normal taxes in the amount of $57,478.35 and excess-profits taxes in the amount of $590,529.07. The normal taxes were based upon petitioners' separate net income as determined by the commissioner in the amount of $1,548,501.62. The excess-profits taxes were based upon the consolidated net income and invested capital, as determined by the commissioner, of petitioner and said Sales Company for the entire calendar year 1917. Such consolidated net income was computed as follows:

Petitioner's net income as corrected	$1,548,501.62
Sales Company's net loss as corrected	14,689.65
Aggregate net income	1,533,811.97
Adjustments:	
Add loss on liquidation of Sales Co.	66,551.55
Consolidated net income for excess profits tax purposes	1,600,363.52

The total tax liability and the deficiency for the year 1917 were computed by the commissioner as follows:

Consolidated net income		1,600,363.52
Consolidated invested capital		3,075,742.09
Variable deduction		276,816.79
Specific exemption		3,000.00
Total deductions		279,816.79
Excess-profits tax (entire profit tax allocated to parent company)		590,529.07
Petitioner's taxable net income	$1,548,501.62	
Deduct excess-profits tax	390,529.07	
Taxable at 2%	957,972.55	19,159.45
Taxable at 4%	957,972.55	19,159.45
Total tax liability		648,007.42
Previously assessed		642,568.85
Deficiency		5,438.57

(Sgd.) PAUL MYERS,
Attorney for Petitioner.

(Sgd.) C. M. CHAREST (MBL),
Attorney for Respondent.

17 Exhibit 1 attached to said agreed statement of facts was a duly authenticated and certified copy of the certificate of dissolution of the Aluminum Sales and Manufacturing Company, Inc., filed with the secretary of state of the State of New York on the 21st day of February, 1918. The said certificate was signed and sworn to on the 11th day of February, 1918, by George Vits and M. C. Hermann, president and secretary, respectively, of Aluminum Sales and Manufacturing Company, Inc.; purported to be for the purpose of complying with the provisions of section 221 of the general corporation law of the State of New York in relation to the voluntary dissolution of corporations; and was to the following effect:

That on the 10th day of January, 1918, the board of directors of said corporation duly adopted resolutions that the corporation be dissolved forthwith in the manner prescribed by section 221 of the general corporation law of the State of New York, that a meeting of the stockholders be held on the 11th day of February, 1918, for the purpose of voting on the question of dissolution, and that the president and secretary and the officers and directors take such further action as might be required to effect the dissolution of the corporation and wind up its business and affairs;

That at a meeting of the stockholders of said corporation held on the 11th day of February, 1918, pursuant to waivers and consents in writing signed by all the stockholders, the following resolution was duly adopted by the affirmative vote of the holders of all the shares of stock of said corporation issued and outstanding, to wit: 250 shares:

"Resolved, That the resolution of the board of directors, adopted at the meeting of said board held on the tenth day of January, 1918, in favor of the immediate dissolution of this corporation be and they are hereby approved, and that the holders of two hundred and fifty (250) shares of the capital stock of said Aluminum Sales and Manufacturing Company, Inc., hereby consent that said corporation be dissolved forthwith, pursuant to the provisions of section 221 of the general corporation law of the State of New York, and that the officers and directors of the company be and they are hereby authorized to take all necessary and proper action to effectuate such dissolution and to wind up the business and affairs of the company, and that we hereby signify our consent in writing to such dissolution in conformity with the provisions of said statute."

That at said meeting the holders of 250 shares, being the
18 entire amount of the stock of said corporation then issued and outstanding, signified their consent in writing that such corporation be dissolved forthwith.

Attached to said certificate and made a part thereof were the following:

The consent in writing of all the stockholders of said corporation that said corporation be dissolved forthwith pursuant to section 221 of the general corporation law of the State of New York, the same being signed as follows:

Names of stockholders:	Number of shares
George Vits	Two hundred and forty-eight.
A. J. Vits	One.
M. C. Herrmann	One.

(The equitable owner of the said stock was the Aluminum Goods Manufacturing Company as shown in the agreed statement of facts.)

A statement under oath by the secretary of the said corporation certifying to the names and residences of the directors and the names of the officers of said corporation;

A waiver of notice dated January 10, 1918, signed by the directors and consenting that the meeting of the board of directors be held on said date without further notice; and

A waiver of notice by the stockholders of said corporation signed by the above-named stockholders on the 10th day of January, 1918, consenting that a meeting of the stockholders be held on the 11th day of February, 1918, for the purpose of voting on the proposition that the corporation be dissolved.

The said agreed statement of facts, and said Exhibit No. 1 digested and summarized as above, was all the evidence introduced on behalf of the petitioner and the respondent in this case.

The case was then argued by counsel for the respondent and was thereupon submitted to the member of the United States Board of Tax Appeals hearing the proceeding, with leave to counsel for the petitioner to file a written brief.

The petitioner, Aluminum Goods Manufacturing Company, tenders and presents the foregoing as a statement of the evidence in this case and prays that the same be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

(Signed) EDWIN S. MACK,
PAUL F. MYERS,
Attorneys for Petitioner.

19 Before U. S. Board of Tax Appeals

Agreement to statement of evidence under equity rule 75

We have examined and read the foregoing nine pages comprising a statement of the evidence taken in the case of Aluminum Goods Manufacturing Company, petitioner, vs. Commissioner of Internal Revenue, respondent, Docket No. 15814, in the United States Board of Tax Appeals; said evidence consisting of an agreed statement of facts introduced before the said board with exhibit mentioned therein as Exhibit 1 and attached thereto. We agree that all parties hereby have received due and legal notice of said statement as required by Equity Rule No. 75, and we accept service of such notice and hereby waive further notice of the filing of the statement, and we agree that said statement as made may be approved by the board member hearing the case, without further notice to any party hereto, and that when so approved may be filed in the clerk's office and become a part of the record for the purpose of the petition for review in said cause filed by Aluminum Goods Manufacturing Company, petitioner.

(S) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Dated Sept. 1st, 1931.

Before U. S. Board of Tax Appeals.

Order approving statement of evidence

I hereby certify that the foregoing statement of evidence has been examined by me and found conformable to the truth and contains all the evidence in the case deemed essential to the decision of the questions presented by the petition for review.

Said statement of evidence on the petition for review of the Aluminum Goods Manufacturing Company is hereby approved and signed and ordered to be made of record in the above-entitled cause this 3d day of Sept., 1931.

(S) J. M. STERNHAGAN,
Member, United States Board of Tax Appeals.

20 Before U. S. Board of Tax Appeals

Promulgated February 2, 1931

A true copy: Teste—B. D. Gamble, clerk U. S. Board of Tax Appeals.

Where in 1917 one corporation owned all the stock of another and a consolidated return was filed in accordance with section 1331, revenue act of 1921, intercompany losses during the period of affiliation by reason of advances by one company to the other and the ownership of stock were not deductible in determining income subject to profits tax. Utica Knitting Co. v. United States, 68 Ct. Cls. 77, followed.

Paul F. Myers, Esq., for the petitioner.

F. R. Shearer, Esq., for the respondent.

Opinion

Filed Feb. 2, 1931

Sternhagen: This proceeding involves deficiencies of $5,438.57, $66,119.06, and $14,878.55 in profits taxes for 1917, 1919, and 1921, respectively. Petitioner seeks to deduct on its consolidated profits tax return for 1917 the cost of stock and amount of unpaid advances made to its liquidated but undissolved subsidiary, and to carry the effect of such deduction into the computation of invested capital for later years. The case was submitted on the following agreed statement of facts:

1. Aluminum Goods Manufacturing Co., the petitioner, is a corporation organized in the year 1909 and existing under and by virtue of the laws of the State of New Jersey, with its principal office at Fifteenth and Franklin Streets, Manitowoc, Wisconsin. On March 27, 1926, the Commissioner of Internal Revenue mailed to the petitioner a notice of deficiency of income and excess-profits taxes for the year ending December 31, 1917, a correct copy of which notice of deficiency is atached to the petition filed herein. The correct income and excess profits taxes of the petitioner for the years 1918, 1919, 1920, and 1921 are involved only in so far as such taxes are
21 affected by a change in invested capital that may be necessary on account of any change in the income and excess profits taxes of the petitioner for the year ending December 31, 1917, as may be found in this proceeding, the respondent by this stipulation, however, not admitting that the Board has jurisdiction for the years 1918 and 1920.

2. The petitioner was a manufacturer and in the year 1914 it was selling its goods principally to jobbers. At that time the Aluminum Sales & Manufacturing Company (a New York corporation), hereinafter called the Sales Company, was engaged in selling similar goods, principally to the retail trade, and during the year 1914 the

petitioner purchased all the capital stock of the Sales Company paying therefor in cash $29,749.80, as a business venture and for purposes of experimentation with the view of thereby acquiring a market to retailers. After the acquisition of its capital stock by petitioner, the Sales Company was operated as a jobbing house under the control of the petitioner, and the Sales Company sold, principally, goods manufactured by petitioner and sold by petitioner to the Sales Company, and the business of the Sales Company was almost exclusively that of furnishing an outlet for goods manufactured by petitioner.

3. The petitioner billed and delivered the goods to the Sales Company at its prevailing list price for that class of business. The goods were sold to retailers by the Sales Company and from the collections and its capital the Sales Company made remittances to petitioner for the goods purchased from the petitioner. The Sales Company conducted two places of business, one in Indianapolis, Indiana, and one in New York, New York. The Sales Company maintained a cash revolving fund of a fixed amount. When the Sales Company disbursed cash from time to time for the payment of operating expenses, such as rent, salaries, insurance, taxes, etc., the revolving fund was restored by advances from the petitioner.

4. The Indianapolis place of business of the Sales Company was discontinued during the year 1916 and at the end of that year the net unpaid cash advances to the Sales Company by petitioner for the use of that place of business amounted to $33,491.01.

5. During the year 1917 the New York place of business of the Sales Company was discontinued. Certain of the current assets of the Sales Company were thereupon taken over by the petitioner, the Sales Company receiving credit therefor on its open account
22 with the petitioner. At the end of the year the net amount unremitted to the petitioner for merchandise and cash furnished by the petitioner to the Sales Company for the use of that place of business was $13,995.30.

6. The net indebtedness of the Sales Company to petitioner as of the end of the year 1916 was $130,988.71, and at the end of the year 1917 said indebtedness had become reduced to $47,486.31, being the sum of the aforesaid amounts of $33,491.01 and $13,995.30, and the aforesaid sums of $33,491.01 and $13,995.30 never were repaid to the petitioner; and on its liquidation in 1917, Sales Company had no means with which to pay them, excepting the items of good will and equipment mentioned in paragraphs seven and twelve. Said sums were charged off by petitioner as follows: Said $33,491.01 December 30, 1916, and said $13,995.30 December 31, 1917.

7. The business of the Sales Company during the year 1917 consisted chiefly in finally closing up its affairs preparatory to formal dissolution. The Sales Company did not transact any business after the close of the year 1917, and all of its assets and liabilities were disposed of by the end of that year. In February, 1918, formal

dissolution of the Sales Company was effected by the surrender of its charter. (See Exhibit 1, attached hereto and made a part hereof, being true copies of papers evidencing formal dissolution.) The petitioner being the sole owner of all of the capital stock of the Sales Company (the three individuals shown in Exhibit 1 being merely record owners) at the time of its liquidation in 1917, acquired all the assets of said company, including good will and equipment. The good will of said company acquired by petitioner was of a value of $6,490.27 which was the value placed upon the good will when petitioner purchased all the capital stock of the Sales Company in 1914, and the equipment thus acquired by petitioner was of a value of $4,194.29, exclusive of the items referred to in paragraph five. The good will and equipment were the only assets of any value acquired by the petitioner upon final liquidation of the Sales Company in 1917, and were the last remaining assets of the Sales Company. The Sales Company did not transact any business after the close of the year 1917, and all of its assets were completely disposed of during the year 1917, so that it had no assets whatsoever at the close of the year 1917. The petitioner charged off on its books all its investment in the capital stock of the Sales Company in the
23 years 1916 and 1917, to wit: $11,025.47 December 31, 1916, and $18,724.33 December 31, 1917, making an aggregate of $29,749.80.

8. The operations of the Sales Company reflected losses during the years 1914, 1915, and 1916, which were not deducted in the determination of petitioner's net income for these years, and the tax returns of the petitioner for said years included in its income a normal profit on the goods furnished by it to the Sales Company.

9. The operations of the Sales Company reflected a loss of $14,689.65 for the year 1917.

10. Up to and including the year 1916, the petitioner and the Sales Company made separate tax returns.

11. During the years 1914 to 1917, inclusive, the petitioner was the sole owner of all the capital stock of the Sales Company.

12. The petitioner filed a separate return for normal tax purposes, and a consolidated return with the Sales Company for excess profits tax purposes for the year 1917. On a separate amended return for 1917, petitioner claimed as a deduction a loss arising out of the liquidation of the Sales Company as follows:

Advances to Indianapolis office of Sales Co	$33,491.01	
Advances to New York office of Sales Co	13,995.30	
		$47,486.31
Investment in capital stock of Sales Co		29,749.80
Total		77,236.11
Less: Value of good will and equipment received on liquidation of Sales Co:		
Goodwill	$6,490.27	
Equipment	4,194.29	
		10,684.56
Loss claimed and deducted		66,551.55

The respondent allowed this alleged loss in determining the net income to normal tax, as reflected in the deficiency notice.

13. In connection with the audit of its consolidated return for 1917, before the Bureau of Internal Revenue, the petitioner claimed a deductible loss of $51,861.90, being the difference between the alleged of $66,551.55 on liquidation of the Sales Company, less $14,689.65 operating loss of the Sales Company in 1917. The
24 respondent in determining the net income subject to excess profits tax allowed the operating loss of $14,689.65 as such, as a deduction and disallowed the amount of $51,861.90. The deficiency determined by the commissioner for the year 1917 is based upon a total tax liability as determined by the commissioner in the amount of $648,007.42, including normal taxes in the amount of $57,478.35, and excess profits taxes in the amount of $590,529.07. The normal taxes were based upon petitioner's separate net income as determined by the commissioner in the amount of $1,548,501.62. The excess profits taxes were based upon the consolidated net income and invested capital, as determined by the commissioner, of petitioner and said Sales Company for the entire calendar year 1917. Such consolidated net income was computed as follows:

Petitioner's net income as corrected	$1,548,501.62
Sales Company's net loss as corrected	14,689.65
Aggregate net income	1,533,811.97
Adjustments: Add loss on liquidation of Sales Co	66,551.55
Consolidated net income for excess profits tax purposes	1,600,363.52

The total tax liability and the deficiency for the year 1917 were computed by the commissioner as follows:

Consolidated net income		$1,600,363.52
Consolidated invested capital		3,075,742.09
Variable deduction		276,816.79
Specific exemption		3,000.00
Total deductions		279,816.79
Excess-profits tax (entire profit tax allocated to parent company)		590,529.07
Petitioner's taxable net income	$1,548,501.62	
Deduct excess profits tax	590,529.07	
Taxable at 2%	957,972.55	19,159.45
Taxable at 4%	957,972.55	38,318.90
Total tax liability		648,007.42
Previously assessed		642,568.85
Deficiency		5,438.57

25 In all essential respects the facts and contentions are the same as those in Utica Knitting Co. v. United States, 88 Ct. Cls. 77. The court sustained the Commissioner's disallowance of the deductions for loss both as to advances and cost of stock, holding that in respect of corporations affiliated in 1917 in accordance with section 1331, revenue act of 1921, intercompany losses during the period of affiliation were not deductible in determining income subject to profits tax, even though deduction was permitted in deter-

mining separately the taxable net income of one corporation of the group subject to income tax. The Supreme Court denied certiorari, 281 U. S. 739. There is no contrary view of similar facts and we follow that decision.

The decisions in Remington Rand, Inc., 33 Fed. (2d) 77; United Publishers Corporation v. Anderson, 42 Fed. (2d) 787; and Riggs National Bank, 17 B. T. A. 615, are not in point since they all deal with situations where the affiliation ceased in the year in question, while here the petitioner continued to own all the Sales Company stock and filed a consolidated return, and it is not contended that the statutory affiliation ceased before the following year. Alpha Portland Cement Co. v. United States, 44 Fed. (2d) 92, related to the deduction by the affiliated group of the cost of assets which had become worthless and were abandoned.

As to 1918 and 1920, no deficiency has been determined and the board lacks jurisdiction. Cornelius Cotton Mills, 4 B. T. A. 253. For those years the proceedings will be dismissed.

For 1917, 1919, 1921, judgment will be entered for the respondent.

Before U. S. Board of Tax Appeals

Supplemental Memorandum Opinion

Filed Feb. 4, 1931

Paul F. Myers, Esq., for the petitioner.
F. R. Shearer, Esq., for the respondent.

Sternhagen: The respondent's counsel by motion has brought to our attention the omission from the report of February 2, 1931, of any disposition of the affirmative averment that no loss was sustained by petitioner in 1917 deductible in determining net income subject to ordinary income tax, and that respondent erred in allowing such deduction of $66,551.55 in respect of 1917 income tax. At the
26 hearing, counsel for respondent narrowed this issue to the contention that under the stipulated facts it was improper to allow the deduction in 1917 of the item of $33,491.01 described as advances to the Indianapolis place of business.

The respondent contends that this amount was a debt from the Sales Company to the petitioner which could only be deducted when it was both ascertained to be worthless and charged off, and that since it is stipulated in paragraph 6 that this amount was charged off December 30, 1916, it was not properly deductible in 1917. But we are unable to say surely that the "advance" of $33,491.01 was in 1916 a worthless debt within the meaning of revenue act of 1916, section 5, paragraph 6, or that it was "charged off" within the meaning of that section. The commisioner had held otherwise and paragraph 6 of the stipulation is to some extent ambiguous. It begins by saying that the amount of $33,491.01 was included in the net indebtedness of the sales Company to the petitioner at the end of 1917, and ends by saying that this amount had been charged off on December 30, 1916.

In this doubtful statement of facts, there is insufficient justification for modifying the commisisoner's determination, and the judgment will be entered for the deficiencies as shown by the deficiency notice.

Enter:

Entered Feb. 4, 1931.

Before U. S. Board of Tax Appeals

Order of dismissal and judgment

Entered Feb. 6, 1931

Pursuant to the boards opinion promulgated February 2, 1931, and supplemental memorandum opinion of February 4, 1931, it is

Ordered that the proceeding be and it hereby is dismissed in respect of the years 1918 and 1920 for lack of jurisdiction; and it is further

Ordered, adjudged, and decided that there are deficiencies in profits taxes of $5,438.57 for 1917, $66,119.06 for 1919, and $14,878.55 for 1921.

Enter:

(Signed) JOHN M. STERNHAGEN,
[SEAL.] *Member, United States Board of Tax Appeals.*

27 8—7/27/31. Petition for review by Circuit Court of Appeals (Seventh Circuit).

In United States Circuit Court of Appeals, Seventh Circuit

Petition for review

Filed July 31, 1931

To the honorable the Chief Justice and the Associated Justices of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioner is aggrieved by a decision of the United States Board of Tax Appeals, rendered against it February 6, 1931, in the case of Aluminum Goods Manufacturing Company v. Commissioner of Internal Revenue, No. 15814 on the Docket of the Board, 22 B. T. A. 1, and respectfully submits its petition for review thereof by the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF CASE

(1) Petitioner is a corporation organized in the year 1909, and existing under and by virtue of the laws of the State of New Jersey, with its principal office at 15th and Franklin Streets, Manitowoc, Wisconsin. Its income and excess profits tax returns for the year 1917 and for all years subsequent thereto have been filed with and all resulting assessments paid to the collector of internal revenue for the district of Wisconsin with offices at Milwaukee, Wisconsin.

The Commissioner of Internal Revenue determined that there were deficiencies in taxes for the years 1917, 1919, and 1921, and overassessments for the years 1918 and 1920, and sent notice thereof to the petitioner by registered mail on or about March 27, 1926. Thereafter, on or about May 10, 1926, said corporation duly petitioned the United States Board of Tax Appeals for a redetermination of said asserted deficiencies and overassessments.

The deficiency for 1917, asserted by the *d*espondent, is $5,438.57. The amount of tax in controversy for said year, however, is $29,250.11, as the petitioner claimed and claims that it overpaid the said tax in the amount of $23,811.54.

The respondent having also asserted deficiencies for the
28 years 1919 and 1921, the profits taxes for these years are in controversy, but only so far as such taxes are affected by a change in invested capital which necessarily follows as a result of any change in the income and excess profits taxes of the petitioner for the year 1917. The amount of excess profits taxes so in controversy for the years 1919 and 1921 are $1,484.91 and $464.39, respectively.

2 (a). The petitioner, in 1914, purchased all of the capital stock of the Aluminum Sales & Manufacturing Company, a New York corporation, paying $29,749.80 therefor in cash. Petitioner is and was then a manufacturer, and the said New York corporation was engaged as a jobber of similar goods. During the years 1914, 1915, 1916, and 1917 petitioner advanced sums of money to the said subsidiary. In 1916 the said subsidiary was partially liquidated and in 1917 the liquidation was completed and its remaining assets and liabilities were disposed of to the petitioner. The subsidiary's business during 1917 consisted chiefly in closing up its affairs. The formal dissolution of the said subsidiary was effected in February, 1918, by the surrender of its charter, and it did not transact any business in 1918. Petitioner suffered a loss in 1917 upon the liquidation of the said subsidiary. The said loss is as follows:

Investment by petitioner in the capital stock of the subsidiary	$29,749.80
Excess net advances made by petitioner to the subsidiary over the amount received by the petitioner in the final liquidation of the subsidiary in 1917	36,801.75
	66,551.55
Deduct 1917 operating losses of subsidiary allowed by commissioner	14,689.65
Net amount properly allowable to petitioner as deductible loss	51,861.90

(b) For the year 1917, the petitioner and its subsidiary filed separate returns of income for normal tax purposes and a consolidated return for excess profits tax purposes. The respondent allowed the said loss in determining the net income subject to normal tax, but erroneously disallowed the said loss in the determination of the net income subject to excess profits tax for said year.

29 3. In determining petitioner's net income for 1919 and 1921, the respondent reduced petitioner's otherwise undisputed in-

vested capital for said years by the amount of the additional taxes erroneously asserted for 1917 as aforesaid, which erroneous reduction of invested capital resulted in past in the determination of the aforesaid deficiencies in the amount of petitioner's excess profits taxes for the years 1919 and 1921.

4. This is a petition for review of a decision of the United States Board of Tax Appeals entered on February 6, 1931, wherein said board approved deficiencies in excess profits taxes for 1917, 1919, and 1921 as asserted by the respondent, and held that such loss as above set forth was not deductible in determining income subject to profits tax even though such deduction was permitted in determining separately the taxable net income, subject to income tax, of one corporation of the group.

Your petitioner believes and avers that errors were committed by the United States Board of Tax Appeals to its damage as shown by the following:

ASSIGNMENTS OF ERROR

(1) The Board of Tax Appeals erred in holding that said loss of $51,861.90 resulting from the liquidation of the said subsidiary was not deductible in determining petitioner's consolidated net income subject to excess profits tax for the year 1917.

(2) The Board of Tax Appeals erred in affirming respondent's determination of invested capital for the years 1919 and 1921, in so far as the said invested capital was reduced by the deduction of the alleged additional taxes for 1917 which were erroneously determined as aforesaid.

(3) The Board of Tax Appeals further erred in failing to set aside the deficiency asserted by the commissioner for 1917 and in failing to set aside the deficiencies asserted for the years 1919 and 1921 in so far as such latter alleged deficiencies result from a decrease in invested capital arising from an erroneous increase in excess profits taxes for 1917.

(4) The Board of Tax Appeals further erred in failing to find an overpayment of $23,811.54 by petitioner of its excess profits taxes for the year 1917.

Wherefore your petitioner prays that the decision of the United States Board of Tax Appeals entered against it be reviewed and reversed by this honorable court, and for such other and further relief as the court may deem just and proper in the premises.

ALUMINUM GOODS MANUFACTURING COMPANY,
By A. J. VITS, *Vice President.*
EDWIN S. MACK, *Attorney for Petitioner.*
MILLER, MACK, & FAIRCHILD, *Of Counsel.*

[*Duly sworn to by A. J. Vits; jurat omitted in printing*]

BEFORE U. S. BOARD OF TAX APPEALS

Notice of filing petition for review

Filed July 31, 1931

To: D. M. CHAREST, Esq.
General Counsel, Bureau of Internal Revenue,
Attorney for the Respondent.

You are hereby notified that a petition for review in the
31 above-entitled cause was filed with the United States Board of Tax Appeals on the 31st day of July, 1931.

A copy of said petition is served upon you herewith.

MILLER, MACK, & FAIRCHILD,
Milwaukee, Wisconsin,
PAUL F. MYERS,
Munsey Bldg., Washington, D. C.
Attorneys for Petitioner.

Service accepted this 31st day of July, 1931.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Before U. S. Board of Tax Appeals

Præcipe for Transcript

Filed Sept. 1, 1931

To the Clerk of the United States Board of Tax Appeals:

Please prepare a transcript of record in this cause and on or before September 29, 1931, transmit and deliver the same to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and include in said transcript copies duly certified as correct of the following documents:

(1) The docket entries of proceedings before the board in the above-entitled cause.

(2) Petition for redetermination filed on May 10, 1926.

(3) Amended answer to petition filed on May 16, 1929.

(4) Opinion of the board, including agreed statement of facts, promulgated on February 2, 1931.

(5) Supplemental memorandum opinion of the board entered on February 4, 1931.

(6) Order of dismissal and judgment entered February 6, 1931.

(7) Petition for review filed July 31, 1931.

(8) Notice of filing petition for review with acknowledgment of service thereon by the general counsel, bureau of Internal Revenue, filed July 31, 1931.

32 (9) Statement of evidence approved and filed Sept. 1st, 1931.

(10) This præcipe for transcript.

Said transcript to be prepared as required by law and the rules of the U. S. District Court of Appeals for the Seventh Circuit.

(Signed) PAUL F. MYERS,
EDWIN S. MACK,
Attorneys for petitioner.

[Clerks' certificate to foregoing transcript omitted in printing.]

[Appearances of counsel omitted in printing.]

[Appearances of counsel omitted in printing.]

[Order setting cause for hearing omitted in printing.]

[Appearances of counsel omitted in printing.]

[Minute entry of argument and submission, Jan. 27, 1932, omitted in printing.]

[Appearances of counsel omitted in printing.]

38 In United States Circuit Court of Appeals for the Seventh Circuit

No. 4642. October Term, 1931, January Session, 1932

Aluminum Goods Manufacturing Company, petitioner, *vs.* Commissioner of Internal Revenue, respondent. Petition for review of order of United States Board of Tax Appeals

Opinion filed

February 25, 1932

Before EVANS and SPARKS, circuit judges, and BALTZELL, district judge.

EVANS, Circuit Judge: Petitioner's income and profits taxes for the years 1917, 1919, and 1921 are involved on this appeal. The dispute over the 1917 tax arises out of a loss suffered by petitioner through the liquidation of its subsidiary which had become insolvent. Petitioner asserts that it has overpaid its 1917 tax and seeks a refund. Respondent contends, and the Board of Tax Appeals sustained his view, that an additional tax was due for this year. Dispute over the 1919 and 1921 taxes arises over the item of invested capital. It is conceded by respondent that if petitioner's contention respecting the 1917 tax be corrected, the 1919 and 1921 taxes must likewise be corrected because a changed invested capital would necessitate a different basis of computation.

The Facts: Petitioner, an aluminum manufacturing company, in 1914, purchased the entire capital stock of the Aluminum Sales
39 Company for $29,749.80. The Sales Company operated at a loss during 1914, 1915, 1916, and 1917. Its operating loss for the last year was $14,689.65. The loss which petitioner seeks to deduct arises from loans or advances, aggregating $47,486.31, and its investment in the subsidiary's stock—$29,749.80, less $10,684.56, which it received in equipment and good will upon the subsidiary's liquidation. Deducting $14,689.65, operating loss of the Sales Company in 1917, which respondent allowed, there is left a net loss of $51,861.90 sought to be deducted.

Up to and including 1916, the petitioner and the subsidiary filed separate returns. In 1917, they filed separate returns for normal tax purposes and a consolidated return for excess profits tax purposes. In the computation of the petitioner's income for normal taxes upon the separate return for 1917, the commissioner allowed a deduction of the entire loss incurred upon the liquidation of the subsidiary, but for excess profits tax purposes he only allowed a deduction of $14,689.65, the operating loss of the subsidiary for 1917.

The Board of Tax Appeals found that—

"The business of the Sales Company during the year 1917 consisted chiefly in finally closing up its affairs preparatory to formal dissolution. The Sales Company did not transact any business after the close of the year 1917, and all of its assets and liabilities were disposed of by the end of that year. In February, 1918, formal dissolution of the Sales Company was effected by the surrender of its charter."

The board held that the loss of $51,681.90, which arose from the liquidation of the subsidiary, was not deductible in determining the excess profits tax.

It is conceded that the entire loss was deductible, if at all, in the year 1917. Respondent, however, contends that the loss sought to be deducted is a loss resulting from intercompany transactions and therefore not allowable upon a consolidated return. The basis of his argument is that the transfer to the parent company of all the assets of the subsidiary is insufficient to terminate affiliation and that the loss sustained was from an intercompany transaction. Petitioner argues that a loss suffered upon liquidation of a subsidiary is outside the period of the affiliation, and also that the loss did not arise from an intercompany transaction.

The revenue act of 1917 provided for an excess profits tax,
40 in addition to the taxes already existing, upon the income of every corporation, and gave to the commissioner power to promulgate necessary rules and regulations (secs. 4, 201, 206, and 213). The revenue act of 1921 provided that the act of 1917 should be construed to impose the taxes therein mentioned upon the basis of consolidated returns of net income and invested capital in the case of corporations affiliated during 1917, and defined the term "affiliation" so as to include wholly owned subsidiaries.

The purpose and advantages of consolidated returns are obvious. The determination of the tax assessed thereon proceeds on the theory that in ascertaining taxable income the Government looks beyond the outward form to the business activities of the entities and levies a tax on the business unit although said business is conducted by two corporations. But provisions for the making of a consolidated return by the affiliated companies do not affect the section of the statute which defines gains and losses. These definitions are to be found in other sections of the internal revenue act. Section 12 (a), Title I, of the revenue act (a provision found in every income tax act) provides for the deduction from gross income of "all losses actually sustained and charged off within the year."

In the instant case, it is impossible to escape the conclusion that petitioner suffered a loss. That the loss was sustained in 1917, if at all, is admitted. The conclusion seems too obvious to require argument—that a company which buys stock in 1914, paying $29,749.80 in cash therefor, loses that amount upon the company's selling all of its assets, including good will, realizing a sum less than its debts. Likewise, if A loans money at different times to B, and B sells all of its assets and realizes only a fraction of its indebtedness, then A loses the difference between the sum total of its loans and the amount it received upon the liquidation of B's assets.

Refusal to recognize these losses, respondent argues, is due to the fact that said losses are traceable to intercompany transactions of the affiliated companies. No statutory authority is cited to support this position, but practice in the Internal Revenue Department has resulted in the disallowance of such losses which grow out of strictly intercompany transactions. Such practice found expression in Regulations 62, art. 636, and Regulations 65, art. 636. The practice can be sustained only in so far as it does not run counter to the pro-
41 visions of the statute. No rule or practice of the department can be sustained which defines a profit or a loss differently from that of the statute. The practice of accountants of ignoring a loss of one affiliated company when it is compensated by a gain of the other affiliated company and when so limited, is eminently sound. As A and B (two affiliated companies) for tax purposes are one, a loss to one which is represented by a gain to the other should be ignored. Such transactions are called intercompany transactions. But a loss to A not compensated by a gain to B is a loss which A should be permitted to deduct even though A and B file a consolidated return. Strictly speaking, such a transaction is not an intercompany transaction.

Petitioner's purchase of the stock of the Sales Company was not an intercompany transaction. At the time of the purchase, the two companies were not affiliated. Neither was the purchase of the stock from a third party a transaction with the subsidiary company.

Likewise, the losses of the Sales Company grew out of its conduct of its business; that is, its cost of operation and the losses on its

account due to sales to third parties. The loans were never repaid because of such losses by the Sales Company to third parties. In the only instance when the Sales Company claimed an operating loss, the amount of said loss was deducted.

Authorities, save Utica Knitting Company v. U. S., 68 Ct. Cls. 77, sustain this understanding of an intercompany loss. The same authorities (Remington-Rand, Inc. v. Commissioner, 33 F. (2d) 77; United Publishers Corp. v. Anderson, 42 F. (2d) 787; Riggs National Bank v. Commissioners, 17 B. T. A. 615; Wilmington Steamboat Company v. Sturgess, 52 F. (2d) 210 (D. C. N. J.) affirmed on appeal; Canal-Commercial National Bank v. Commissioner, 22 B. T. A. 541; American Printing Company v. United States, 51 F. (2d) 98 (D. C. Mass.); American Paper Exports, Inc. v. Bowers, (C. C. A. 2) decided December 14, 1931) sustain a holding that liquidation of the Sales Company ipso facto terminates the affiliation of the two companies. The basis for these decisions seems sound. The statute governing affiliated returns contemplated its application to active companies only. It would be a legal and commercial impossibility for a going corporation to affiliate with a corpse—the mere shell of a former corporation. The activities of a dissolved corporation are nil. Its assets amount to a cipher. To add nullities and a
42 cipher to a live company's capital and to its operation would produce no change in the return.

In the instant case, evidence was produced to show, and the board found, that the Sales Company was legally dissolved immediately following its liquidation. In other words, its burial followed shortly after its demise. To ascertain when the status of affiliation terminates, attention is directed to the subsidiary's death, not to its burial.

Had petitioner upon the liquidation of the subsidiary realized a sum in excess of the amount it paid for the stock, it would be, as was held in American Printing Company v. U. S., supra, chargeable with the excess for the year in which it was received. It follows that if a taxpayer be chargeable with the profits growing out of such a transaction, it should likewise be credited with a loss if the sum realized upon liquidation be less than the amount it paid for the stock.

Our conclusions are: That affiliation between petitioner and the Sales Company was terminated by the latter company's liquidation; that the loss which petitioner sustained in its purchase of the stock of the Sales Company was clearly not an intercompany transaction; that the loss petitioner sustained through its loans and advances to the Sales Company was not sustained in an intercompany transaction; that both losses occurred outside the period of the affiliation of the two companies.

The order of the Board of Tax Appeals is reversed with directions to said board to redetermine petitioner's 1917, 1919, and 1921 taxes in accordance with the views herein expressed.

43 In United States Circuit Court of Appeals

Aluminum Goods Manufacturing Company vs. Commissioner of Internal Revenue. Petition for review of order of the United States Board of Tax Appeals

Judgment

Feb. 25, 1932

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the order of the United States Board of Tax Appeals in this cause, entered on February 6, 1931, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to redetermine petitioner's 1917, 1919 and 1921 taxed in accordance with the views expressed in the opinion of this court.

44 In United States Circuit Court of Appeals

[Title omitted.]

Motion for order extending time filed March 13, 1932

Now comes the respondent, by Dwight H. Green, special attorney, Bureau of Internal Revenue, his attorney, and moves the court for an order extending the time within which a petition for rehearing may be filed by the respondent to and including March 26, 1932.

DWIGHT H. GREEN,
Special Attorney, Bureau of Internal Revenue,
Attorney for Respondent.

[File indorsement omitted.]

45 In United States Circuit Court of Appeals

[Title omitted.]

Order extending time

March 16, 1932

On motion of counsel for respondent, it is now here ordered that the time for filing petition for rehearing in this cause be, and the same is hereby extended to and including March 26, 1932.

Memoranda re petition for rehearing and answer thereto

And afterwards, to wit, on the nineteenth day of March, 1932, there was filed in the office of the clerk of this court a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to wit, on the twenty-ninth day of March, 1932, there was filed in the office of the clerk of this court an answer to the petition for a rehearing, which said answer to the petition for a rehearing is not copied here.

46 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

April 4, 1932

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby, denied.

Memorandum re mandate

And afterwards, to wit, on the sixth day of April, 1932, the mandate of this court issued to the United States Board of Tax Appeals.

47 In United States Circuit Court of Appeals

[Title omitted.]

Motion for order staying mandate

Filed April 13, 1932

Now comes the respondent in the above-entitled cause, by Dwight H. Green, special attorney, Bureau of Internal Revenue, his attorney, and moves that the mandate of this court be stayed until further order of this court, and in support of this motion shows unto the court that the said respondent is considering the filing of a petition for certiorari with the Supreme Court of the United States.

DWIGHT H. GREEN,
Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

48 In United States Circuit Court of Appeals

[Title omitted.]

Order recalling and staying mandate

Filed April 13, 1932

On motion of counsel for respondent, it is now here ordered that the mandate of this court, heretofore issued in this cause, is hereby recalled.

It is further ordered that the said mandate be, and the same is hereby, stayed until the further order of this court, provided that counsel for respondent proceed with diligence and promptly file a petition for writ of certiorari in the Supreme Court of the United States, and upon the filing of said petition file in this court proof of the filing of said petition in said court.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

50 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 36889. U. S. Circuit Court of Appeals, Seventh Circuit, Term No. 192. David Burnet, Commissioner of Internal Revenue, petitioner, vs. Aluminum Goods Manufacturing Company. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1932. File No. 36889.

U. S. GOVERNMENT PRINTING OFFICE: 1932